STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4
Case No. 2013AP001023

ADAM R. MAYHUGH,
Plaintiff-Appellant,
v.
STATE OF WISCONSIN, WISCONSIN DEPARTMENT OF CORRECTIONS AND REDGRANITE CORRECTIONAL INSTITUTION,
Defendants-Respondents,
GARY HAMBLIN, MICHAEL A. DITTMANN, JOHN A. DOE, JOHN B. DOE, ABC ENGINEERING COMPANY, DEF CONSTRUCTION COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY AND PQR INSURANCE COMPANY,
Defendants.

APPEAL FROM AN ORDER OF THE WAUSHARA COUNTY CIRCUIT COURT, THE HONORABLE GUY D. DUTCHER PRESIDING, CASE NO. 12-CV-124

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....2

ARGUMENT 2

I. SINCE THE "SUE AND BE SUED" LANGUAGE DID NOT WAIVE SOVEREIGN IMMUNITY FOR THE PREDECESSOR OF THE WISCONSIN DEPARTMENT OF CORRECTIONS ("DOC") IT DOES NOT WAIVE SOVEREIGN IMMUNITY FOR DOC. 2

II. SINCE THE LEGISLATURE HAS NOT STATED ITS INTENT TO CREATE DOC AS AN INDEPENDENT GOING CONCERN, SOVEREIGN IMMUNITY EXTENDS TO IT AS AN ARM OF THE STATE. 4

CONCLUSION 6

Cases

Bahr v. State Investment Board,
186 Wis. 2d 379,
521 N.W.2d 152 (Ct. App. 1994) 4, 5

Burse v. Dane County Regional Planning Comm.,
181 Wis. 2d 527,
511 N.W.2d 356 (Ct. App. 1993) 6

City of Stoughton,
87 Wis. 2d 131,
274 N.W.2d 598 (1979).....6

Page

Lindas v. Cady,
142 Wis. 2d 857,
419 N.W.2d 345 (Ct. App. 1987) 2, 3

Majerus v. Milwaukee County,
39 Wis. 2d 311,
159 N.W.2d 86 (1968) 4, 5

Townsend v. Wisconsin Desert Horse Ass'n,
42 Wis.2d 414,
167 N.W.2d 425 (1969).....3, 4

Walker v. Univ. of Wisconsin Hospitals,
198 Wis. 2d 237,
542 N.W.2d 207 (Ct. App. 1995) 6

Statutes

Wis. Stat. § 20.410.....5

Wis. Stat. § 301.04.....2

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it would not justify the additional expenditure of court time or cost to the litigants.

The opinion should not be published because the issues will be decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent.

ARGUMENT

I. SINCE THE "SUE AND BE SUED" LANGUAGE DID NOT WAIVE SOVEREIGN IMMUNITY FOR THE PREDECESSOR OF THE WISCONSIN DEPARTMENT OF CORRECTIONS ("DOC") IT DOES NOT WAIVE SOVEREIGN IMMUNITY FOR DOC.

Mayhugh contends that the Legislature has waived sovereign immunity for the Wisconsin Department of Corrections ("DOC") by enacting Wis. Stat. § 301.04 and by giving DOC sufficient proprietary powers to be considered an independent going concern (appellant's brief at 16-29).

Mayhugh's argument in support of his first contention is that § 301.04, which states that "The department may sue or be sued," constitutes a waiver of sovereign immunity (appellant's brief at 17-18). However, this argument is not persuasive because this court has held that the "sue and be sued" language is not the equivalent of a legislative waiver of immunity. *Lindas v. Cady*, 142 Wis. 2d 857, 861-862, 419 N.W.2d 345 (Ct. App. 1987), *reversed on other grounds, Lindas v. Cady*,

150 Wis. 2d 421, 441 N.W.2d 705 (1989). The court reasoned that the statute was in existence when the State enjoyed governmental immunity from suit and, hence, it could not have been intended to permit suit. *Id.* As the court later was to explain:

> Our decision in *Lindas* was based on a 1969 case, *Townsend v. Wisconsin Desert Horse Ass'n*, 42 Wis.2d 414, 167 N.W.2d 425 (1969), where the supreme court held that a statute allowing claims against the state to proceed upon the filing of a $1,000 bond did not apply to tort claims because, at the time the legislature passed the statute, the state was not subject to tort liability.
>
> > We think all that the legislature had in mind at the time it passed the [statute] was to consent to be sued in cases only where there then existed a liability for the claim, and it is a little late in the day for this court now to say that the legislature also intended to include a consent to be sued for tort claims if this court at sometime in the future reversed itself and abolished governmental tort immunity. We cannot now put meaning into this section as a consent to be sued because *Holytz [v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962)] . . . has removed the defense of tort immunity.
>
> *Id.* at 420-21, 167 N.W.2d at 428. Based on that statement in *Townsend*, our conclusion in *Lindas* was simply: "We think the same reasoning applies to [the statute authorizing DHSS to sue and be sued]." *Lindas*, 142 Wis.2d at 862, 419 N.W.2d at 347.

Bahr v. State Investment Board, 186 Wis. 2d 379, 391-92, 521 N.W.2d 152 (Ct. App. 1994).

Here, although the "sue and be sued" language for DOC was enacted in 1990, 1989 Act 31, § 2569, the Wisconsin Department of Health and Social Services ("DHSS") operated the State's correctional institutions prior to the creation of DOC. Since this court held in *Lindas* that the "sue and be sued" language did not constitute a waiver of sovereign immunity for the predecessor of DOC, it should conclude that it also does not constitute a waiver of sovereign immunity for DOC particular since there has been no "clear and definite language of consent to suit . . . indicating that the Legislature intended otherwise as would be required for a waiver of sovereign immunity. *Townsend*, 42 Wis. 2d at 421.

II. SINCE THE LEGISLATURE HAS NOT STATED ITS INTENT TO CREATE DOC AS AN INDEPENDENT GOING CONCERN, SOVEREIGN IMMUNITY EXTENDS TO IT AS AN ARM OF THE STATE.

Mayhugh's argument in support of his second contention is that "The statutory powers that the Wisconsin Legislature has provided to the WDOC is [sic] diverse and exceeds [sic] the scope of the powers outlined in *Majerus*" (appellant's brief at 20). However, this argument is not persuasive because the Wisconsin State Armory Board, which was held to be an "independent going concern," *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 315, 159 N.W.2d 86 (1968), had been designated by the Legislature as a body politic and corporate, *ibid*. The DOC has not been so designated.

In addition, as noted in *Bahr*, 186 Wis. 2d at 395, n. 8:

> Briefly, the *Majerus* court emphasized the armory board's power to hold and disburse funds "independent of state warrants," and the fact that it received no appropriations from the legislature but rather had the power to borrow money and sell bonds "to accomplish its purposes," and to satisfy those debts out of the rents and interest received from the property it acquires. *Majerus*, 39 Wis. 2d at 314-15, 159 N.W.2d at 87.

This is not true of the DOC as is obvious from Wis. Stat. § 20.410 which appropriates money for almost all of the DOC's programs.

The State of Wisconsin Investment Board was held to be an "independent going concern," *Bahr*, 186 Wis. 2d at 399, but it was not only authorized to sue and be sued but "the legislature ha[d] expressly stated its 'intent . . . that the board be an independent agency of the state. . . .,'" *ibid*. The Legislature has not stated its intent that the DOC be an independent agency of the State.

Furthermore, the *Bahr* court emphasized that "no general purpose revenues are allocated to the board, and . . . its operations are funded by its own program revenues." 186 Wis. 2d at 398. This is not true of the DOC as is obvious from Wis. Stat. § 20.410. Nor does the DOC have the "broad authority to manage and invest, sell, reinvest and collect income and rents, to employ outside counsel and contractors, and to acquire, manage and sell real estate without DOA participation . . ." as did the Investment Board. *Bahr*, 186 Wis. 2d at 399.

What is important is "the legislature's intent. . . ." *Bahr*, 186 Wis. 2d at 395. Mayhugh has pointed to nothing that amounts to "express legislative authorization.

. . .” that the Legislature intended the DOC to be an “independent going concern.” *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 144, 274 N.W.2d 598 (1979). The “independent going concern” is a “traditionally narrow exception,” and the DOC, like the Wisconsin Department of Natural Resources, “despite its broad powers, is only an administrative body, an arm or agency of the state. The state’s immunity therefore extends to it.” *Ibid*; see also *Walker v. Univ. of Wisconsin Hospitals*, 198 Wis. 2d 237, 248, 542 N.W.2d 207 (Ct. App. 1995); *Busse v. Dane County Regional Planning Comm.*, 181 Wis. 2d 527, 539, 511 N.W.2d 356 (Ct. App. 1993).

CONCLUSION

The order should be affirmed.

Dated this 14th day of August, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,195 words.

Dated this 14th day of August, 2013.

_____

John J. Glinski
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of August, 2013.

_____

John J. Glinski
Assistant Attorney General